

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

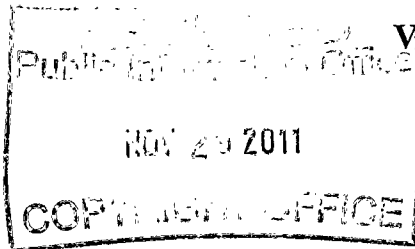
In the Matter of:

Determination of Rates and Terms for
Preexisting Subscription Services and
Satellite Digital Audio Radio Services

Docket No. 2011-1
CRB PSS/Satellite II

**WRITTEN DIRECT STATEMENT
OF SOUNDEXCHANGE, INC.**

Volume 1: Introductory Materials



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November 29, 2011

ATTACHED NOTES

Original

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**INTRODUCTORY MEMORANDUM TO THE
WRITTEN DIRECT CASE OF SOUNDEXCHANGE, INC.**

SoundExchange, Inc. ("SoundExchange"), through its undersigned counsel, respectfully submits this Introductory Memorandum to its written direct case in accordance with 37 C.F.R.

§ 351.4. This Memorandum describes the contents of SoundExchange's written direct case and briefly summarizes the testimony of its witnesses.

CONTENTS OF SOUNDEXCHANGE'S WRITTEN DIRECT CASE

Volume 1 contains: (A) this Introductory Memorandum; (B) SoundExchange's Proposed Rates and Terms; (C) an index of SoundExchange's witness testimony; (D) an index of SoundExchange's exhibits; and (E) a certificate of service.

Volume 2 contains the written direct testimony of SoundExchange's nine witnesses and SoundExchange's exhibits.

Pursuant to 37 C.F.R. § 350.4(a), § 351.4(a), and the Court's Order of August 17, 2011, SoundExchange is filing an original, five copies, and an electronic copy of the materials in Volumes 1 and 2.

The written testimony of 5 of SoundExchange's witnesses contains information that SoundExchange has marked as Restricted, as that term is defined in Paragraph 2 of the Protective Order entered by this Court on November 16, 2011. SoundExchange is filing a motion for application of the Protective Order to the portions of the testimony it has marked as Restricted. In connection with that motion, SoundExchange is filing a Declaration and Rule 11 Certification of Michael DeSanctis and a redaction log identifying the page number, and where appropriate the line number, of each proposed redaction and briefly describing the nature of the Protected Material proposed to be redacted.

As set forth in its motion for application of the Protective Order, SoundExchange requests that, in the event the Court declines to apply the Protective Order to any portion of the information that SoundExchange has marked Restricted, the Court provide SoundExchange the opportunity to withdraw the information from its written direct case, or replace it with publicly available information, before the materials are made publicly available.

SUMMARY OF THE WRITTEN TESTIMONY OF SOUNDEXCHANGE'S WITNESSES

SoundExchange's written direct case includes the written testimony of the following four expert and five fact witnesses.

A. Expert Witnesses

Janusz A. Ordovery, Ph.D., is a Professor of Economics and former Director of the Masters in Economics Program at New York University. His testimony supports SoundExchange's rate proposal for the SDARS. Dr. Ordovery analyzes the economic principles underlying the first three policy objectives of 17 U.S.C. § 801(b)(1) and explains why these objectives are best met through reliance on royalty rates developed through marketplace transactions between sound recording copyright owners and users of recorded music. He then

undertakes an analysis of digital music services and concludes that mobile, subscription, interactive audio streaming services are the most appropriate benchmark service from which to derive a royalty rate for the SDARS.

Relying on the interactive subscription services as his benchmark, Dr. Ordover presents a number of approaches for determining an appropriate royalty. All of his approaches result in a percentage-of-revenue royalty rate, which Dr. Ordover explains is the preferable rate structure in the absence of measurable usage data.

First, Dr. Ordover examines the actual licensing fees paid to the four major record companies under the terms of the applicable agreements. From that analysis he derives a range of the effective percentage-of-revenue fees that interactive subscription services pay. He then adjusts those benchmark rates to account for the value of the non-music content offered by Sirius XM, using a calculation derived from Sirius XM's retail subscription prices. The results of this analysis yield a target royalty rate of between 30% and 32.5%.

Second, Dr. Ordover examines whether there are general prevailing rates, expressed as a percentage of revenue, for music service providers. The analysis of other marketplace agreements demonstrates that the percentage-of-revenue rates agreed to the record companies and a variety of music service providers cluster in a range that corroborates the reasonableness of his first approach.

Finally, Dr. Ordover relies on the effective per-subscriber rates that are paid by interactive subscription services to the record companies. He then presents two alternative adjustments to those rates to account for differences between the benchmark services and Sirius XM's satellite radio service, using an estimate of the market price of a hypothetical music-only satellite radio service. To make his first adjustment, Dr. Ordover compares the retail

subscription prices for interactive subscription services to the price for the hypothetical music-only satellite radio service in order to isolate the overall value difference that subscribers assign to the two services. He then uses that ratio to adjust the per-subscriber rates from the interactive subscription services into a comparable per-subscriber rate for Sirius XM, which he converts into a percentage-of-revenue rate. Dr. Ordover's second possible adjustment focuses solely on interactivity as a difference between the benchmark services and Sirius XM. His calculation follows the same approach, but the adjustment ratio is derived from a comparison of the retail prices of noninteractive subscription services to the retail prices of interactive subscription services. The first adjustment results in a recommended rate of 29.81% and the second results in a recommended rate of 22.32%.

Dr. Ordover ultimately concludes that based on the market evidence, SoundExchange's proposed rates are both reasonable and conservative.

Thomas Z. Lys, Ph.D., is the Eric L. Kohler Chair in Accounting and Professor of Accounting and Information Management at the Kellogg School of Management, Northwestern University. His testimony considers whether SoundExchange's rate proposal would be disruptive to the SDARS. In particular, like the Copyright Royalty Judges in the prior SDARS proceeding, he analyzes the effect of SoundExchange's rate proposal on Sirius XM's free cash flow and EBITDA profitability. Based on Sirius XM's publicly available financial data, and making conservative assumptions, Dr. Lys concludes that, under SoundExchange's proposed royalty rates, Sirius XM is projected to achieve record-high EBITDA (ranging from \$958.9 million in 2013 to \$1.3 billion in 2017) and record-high free cash flows (ranging from \$725 million in 2013 to over \$900 million in 2016 and 2017) during the coming rate term. Indeed, his analysis shows that, even based on very conservative assumptions, the proposed royalty rate

would have to be substantially greater (more than 31 percent starting in 2013 and more than 37 percent starting by 2017) before Sirius XM would experience negative EBITDA or negative free cash flows. According to Dr. Lys, these figures and conclusions are conservative because they assume that: (1) Sirius XM will pay royalties on 100% of total revenue, even though Sirius XM has historically paid on substantially less than all of its revenue; and (2) Sirius XM will not pass on all or part of the increased royalty rate to its subscribers through the U.S. Music Royalty Fee, even though it has done so in the past and likely would be able to do so again in the future.

J. Gregory Sidak, is the Chairman of Criterion Economics L.L.C. and the Ronald Coase Professor of Law and Economics, Tilburg Institute for Law and Economics, Tilburg University. His testimony first explains that the Sirius-XM merger in 2008 enhanced Sirius XM's ability to pay a higher royalty and still earn a "fair income." He observes that Sirius XM has been able to increase subscribership even while real household income has fallen, and that Sirius XM is able to raise prices. His testimony also examines the risks that Sirius XM has publicly stated it will face in the next license period, including competition from other forms of audio entertainment. His analysis shows that Sirius XM has significant competitive advantages over other delivery platforms for audio entertainment, and that other services are unlikely to reduce Sirius XM's subscribership or significantly constrain its prices during the 2013-2017 rate period. Finally, his testimony calculates the royalty rate that would cause Sirius XM to cease operating, and concludes that such a rate would be far higher than the rates proposed by SoundExchange.

George S. Ford, Ph.D., is the President of Applied Economic Studies, a private consulting firm specializing in economic and econometric analysis. He is also the Chief Economist of the Phoenix Center for Advanced Legal & Economic Policy Studies, a 501(c)(3) research organization that specializes in the legal and economic analysis of public policy issues involving

the communications and technology industries, and is an Adjunct Professor at Samford University in Birmingham, Alabama.

Dr. Ford's testimony supports (i) SoundExchange's proposal for ephemeral copies under Section 112(e) of the Copyright Act, and (ii) SoundExchange's rate proposal for the PSS. With respect to ephemerals, Dr. Ford concludes that, based on economic theory and marketplace evidence, the value of ephemeral copies is best expressed as a fixed percentage of the overall royalty rate paid by webcasters for combined activities under Sections 112(e) and 114. In turn, Dr. Ford analyzes the unique hypothetical market set up by Sections 112 and 114 whereby payments under Section 112(e) are made directly to the record companies, while payments under Section 114 must be divided evenly between the record companies and the artists. Dr. Ford reasons that the statutory regime requires consideration of all three interested parties (i.e., the service, the record company and the artist). He concludes that the results of such a voluntary negotiation would be the result determined as between the record companies and the artists, as the only two entities in the negotiation with an interest in the outcome. He observes that the record companies and artists have recently reached agreements both with webcasters in the *Webcasting III* proceeding and with the SDARS in the remand of the *SDARS I* proceeding in which the royalty rate for the Section 112 license is attributed to be 5% of the bundled royalties for the Section 112 and 114 licenses.

With respect to the PSS, Dr. Ford concludes that SoundExchange's proposed revenue-based royalty fee of 15% in 2013 with increases of five or ten percentage points each year to a rate of 45% in 2017 is reasonable. Dr. Ford's analysis is based on the basic economic concept that sound recording copyright owners should be comparably compensated for comparable uses of their rights at rates consistent with marketplace outcomes. As part of his analysis, Dr. Ford

reviewed the revenue-based royalty rates of marketplace contracts for various types of music services to serve as benchmarks for the PSS rate. In addition, he analyzed whether the 801(b) policy objectives weigh in favor of divergence from the results indicated by the benchmark marketplace evidence. Based on his analysis, Dr. Ford concludes that SoundExchange's proposed rate for 2017 is probably at or below the lower bound of a royalty rate consistent with a marketplace benchmark and that by implementing the increase over a period of five years, SoundExchange's proposed rate satisfies the 801(b) statutory standard.

B. Fact Witnesses

Jonathan Bender is the Chief Operating Officer of SoundExchange. His testimony provides background information about SoundExchange and its operations, and describes SoundExchange's processing and distribution of royalties. His testimony also supports SoundExchange's proposed definition of revenue for the SDARS, explaining the ways in which the current SDARS definition of gross revenues has proven difficult to administer and why SoundExchange's proposed revised definition would be preferable; and it supports SoundExchange's proposed minimum fees and terms for the SDARS and PSS. In addition, Mr. Bender states that SoundExchange should be the sole Collective for collecting and distributing royalties under the Section 112 and 114 licenses.

Stephen Bryan is Executive Vice President of Digital Strategy and Business Development, Recorded Music at Warner Music Group ("WMG"). Mr. Bryan's testimony offers the perspective of a sound recording copyright owner on a number of the issues implicated in this proceeding. His primary focus is providing information about WMG's marketplace licensing strategy and some of the key terms of WMG's digital distribution agreement. He also explains WMG's strategy for negotiating revenue definitions, including the benefit of keeping revenue definitions specific and easy to administer. With respect to the PSS, Mr. Bryan explains that the

current royalty rate paid by the PSS is far below a rate that WMG would agree to for a music service outside of the statutory license. He also provides insight into WMG's treatment of the ephemeral right in marketplace agreements and the value of the right. Finally, he expresses support for the designation of SoundExchange as the sole Collective.

Charles Ciongoli is Executive Vice President and Chief Financial Officer for Universal Music Group North America ("UMG"). His testimony discusses the changing landscape of the music industry as it migrates from physical to digital distribution. According to Mr. Ciongoli, as part of this transformation: (1) consumers are purchasing fewer and fewer physical products and are instead opting for an array of digital audio formats; and (2) the model for how the public consumes music is slowly migrating from a model based on "ownership" of music to a model based on "access" to music through services, like Sirius XM, who do not "sell" music but instead provide "access" to a wide range of music. As a result of these changes, UMG, and other record companies, must rely heavily on digital revenues from all sources, including importantly from the statutory licenses for Sirius XM. Finally, Mr. Ciongoli describes in detail UMG's substantial investment in and contribution to the creation, marketing, and distribution of sound recordings each year.

Raymond Hair is the International President of the American Federation of Musicians of the United States and Canada ("AFM"). His testimony emphasizes the importance of statutory royalties to performing artists, and expresses the AFM's support for the designation of SoundExchange as the sole Collective to collect and distribute the royalties at issue in this proceeding for the period of 2013 through 2017.

Darius Van Arman is the founder of Jagjaguwar, an independent record label. His testimony describes the contributions of independent labels like Jagjaguwar in making sound

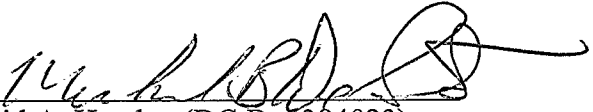
recordings available to the public, and discusses the growing importance of statutory royalties to independent labels. His testimony also describes a proposal that Music Reports, Inc. ("MRI") recently made to Jagjaguwar to enter into a direct licensing agreement with Sirius XM. Among other things, the proposal stated that while SoundExchange pays 50% of performance royalties to artists, the royalties paid to Jagjaguwar under the direct licensing agreement would include the artists' share. The proposal also stated that Sirius XM expects that, over time, it will increase its reliance on the use of directly-licensed recordings as compared to recordings that are not directly licensed. Mr. Van Arman's testimony explains the reasons Jagjaguwar has not accepted MRI's direct licensing proposal. Finally, his testimony endorses the designation of SoundExchange as the sole Collective.

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PROPOSED RATES AND TERMS OF SOUNDEXCHANGE, INC.

Pursuant to 37 C.F.R. § 351.4(b)(3), SoundExchange, Inc. (“SoundExchange”) proposes the rates and terms set forth herein for digital audio transmissions made by Preexisting Satellite Digital Audio Radio Services as defined in 17 U.S.C. § 114(j)(10) (“SDARS”) and Preexisting Subscription Services as defined in 17 U.S.C. § 114(j)(11) (“PSS”) under the statutory license provided by 17 U.S.C. § 114, together with the making of ephemeral recordings necessary to facilitate such transmissions under the statutory license provided by 17 U.S.C. § 112(e) during the period January 1, 2013 through December 31, 2017.

Pursuant to 37 C.F.R. § 351.4(b)(3), SoundExchange reserves the right to revise its proposed rates and terms at any time during the proceeding up to, and including, the filing of its proposed findings of fact and conclusions of law.

I. ROYALTY RATES

A. SDARS

1. PERCENTAGE RATES

For all licensed transmissions and related ephemeral recordings by an SDARS, SoundExchange requests royalty rates that are a percentage of "Gross Revenues" as set forth below:

<u>Year</u>	<u>Percentage</u>
2013	12%
2014	14%
2015	16%
2016	18%
2017	20%

2. DEFINITION OF GROSS REVENUES

SoundExchange proposes that the foregoing percentages be applied to a royalty base determined by the following definition of Gross Revenues:

(1) Gross Revenues shall mean revenues recognized by the Licensee in accordance with GAAP from the operation of an SDARS in the U.S., and shall be comprised of the following:

(i) All subscription, activation, subscription-related and other revenues recognized by Licensee from fees paid or payable by or for U.S. subscribers to Licensee's SDARS with respect to any and all services provided by the Licensee to such subscribers, unless excluded by paragraph (3) below;

(ii) Licensee's advertising revenues, or other revenues from sponsors, if any, attributable to advertising on channels of Licensee's SDARS in the U.S. other than those that use only incidental performances of sound recordings, less advertising agency and sales commissions attributable to advertising revenues included in Gross Revenues; and

(iii) Revenues attributable to the sale, lease or other distribution of equipment and/or other technology for use by U.S. subscribers to receive or play the SDARS service, including any shipping and handling fees therefor.

(2) Gross Revenues shall include such payments as set forth in paragraphs (1)(i) through (iii) of the definition of "Gross Revenues" to which Licensee is entitled but which are paid to a parent, subsidiary or division of Licensee.

(3) To the extent otherwise included by paragraph (1), Gross Revenues shall exclude:

(i) Royalties paid to Licensee by persons other than subscribers, advertisers and sponsors for intellectual property rights;

(ii) Revenues from the sale of phonorecords and digital phonorecord deliveries sold by Licensee (but not any affiliate fees or other payments by a third party for advertising of downloads sold by a third party);

(iii) Sales and use taxes; and

(iv) Revenues recognized by Licensee for the provision of—

(A) Data services (*e.g.*, weather, traffic, destination information, messaging, sports scores, stock ticker information, extended program associated data, video and photographic images, and such other telematics and/or data services as may exist from time to time, but not transmission of sound recording data), when such services are provided on a standalone basis (*i.e.*, priced separately from Licensee's SDARS, and offered at the same price both to subscribers to Licensee's SDARS and persons who are not subscribers to Licensee's SDARS);

(B) Channels, programming, products and/or other services provided outside of the United States; and

(C) Subscription revenues recognized for separately licensed services, including webcasting, interactive services, transmissions to business establishments, and audio services bundled with television programming and subject to the rates provided in part 383, when such services are provided on a standalone basis (*i.e.*, priced separately from Licensee's SDARS, and offered at the same price both to subscribers to Licensee's SDARS and persons who are not subscribers to Licensee's SDARS).

3. ALLOCATION BETWEEN SECTION 112 AND 114

SoundExchange proposes that the combined Section 112/114 royalty described above be allocated 5% to Section 112 and 95% to Section 114, in the manner presently set forth in 37 C.F.R. § 382.12(b).

4. EPHEMERAL ROYALTY MINIMUM FEE

Pursuant to 17 U.S.C. § 112(e)(3) and (4), SoundExchange proposes that an SDARS pay an annual, nonrefundable minimum fee of \$100,000 creditable to ephemeral royalty payments.

B. PSS

1. PERCENTAGE RATES

For all licensed transmissions and related ephemeral recordings by a PSS, SoundExchange requests royalty rates that are a percentage of "Gross Revenues" as set forth below:

<u>Year</u>	<u>Percentage</u>
2013	15%
2014	20%
2015	25%
2016	35%
2017	45%

2. DEFINITION OF GROSS REVENUES

SoundExchange proposes that the foregoing percentages be applied to a royalty base determined by the definition of Gross Revenues presently set forth in 37 C.F.R. § 382.2(e) (although SoundExchange proposes relocating that definition within the applicable regulations and adjusting internal cross references accordingly).

3. ALLOCATION BETWEEN SECTION 112 AND 114

SoundExchange proposes that the combined Section 112/114 royalty described above be allocated 5% to Section 112 and 95% to Section 114.

4. MINIMUM FEE

SoundExchange proposes that a PSS pay an annual, nonrefundable minimum fee of \$100,000 creditable to all its statutory royalty payments, in the manner presently set forth in 37

C.F.R. § 382.2(c) (subject to technical and conforming changes in the regulation setting forth such arrangement).

II. TERMS


SoundExchange proposes that the terms currently set forth in 37 C.F.R. Part 382 for the most part be continued, subject to generally technical and conforming changes. The majority of these changes consist of conforming the PSS terms to the SDARS terms. These changes are described in the testimony of Jonathan Bender.

SoundExchange has set forth its proposed terms (along with its proposed rates) in proposed regulations attached hereto. Exhibit A is a clean copy of the proposed regulations, and Exhibit B is redlined to show changes from the regulations currently provided in 37 C.F.R. Part 382.

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Exhibit A
Proposed Regulations

PART 382—RATES AND TERMS FOR DIGITAL TRANSMISSIONS OF SOUND RECORDINGS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY PREEXISTING SUBSCRIPTION SERVICES AND PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES

Subpart A—Preexisting Subscription Services

Sec.

- 382.1 General.
- 382.2 Definitions.
- 382.3 Royalty fees for the digital performance of sound recordings and the making of ephemeral recordings by preexisting subscription services.
- 382.4 Terms for making payment of royalty fees and statements of account.
- 382.5 Confidential information.
- 382.6 Verification of royalty payments.
- 382.7 Verification of royalty distributions.
- 382.8 Unclaimed funds.

Subpart B—Preexisting Satellite Digital Audio Radio Services

- 382.10 General.
- 382.11 Definitions.
- 382.12 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.
- 382.13 Terms for making payment of royalty fees and statements of account.
- 382.14 Confidential information.
- 382.15 Verification of royalty payments.
- 382.16 Verification of royalty distributions.
- 382.17 Unclaimed funds.

Authority: 17 U.S.C. 112(e), 114 and 801(b)(1).

Subpart A—Preexisting Subscription Services

§ 382.1 General.

(a) This subpart establishes rates and terms of royalty payments for the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings in connection with the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 112(e).

(b) Upon compliance with 17 U.S.C. 114 and the terms and rates of this subpart, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 114(d)(2).

(c) Upon compliance with 17 U.S.C. 112(e) and the terms and rates of this subpart, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 112(e) without limit to the number of ephemeral phonorecords made.

§ 382.2 Definitions.

For purposes of this subpart, the following definitions shall apply:

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2013–2017 license period, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114 and subject to the limitations specified in 17 U.S.C. 112(e).

Gross revenues shall mean all monies derived from the operation of the programming service of the Licensee and shall be comprised of the following:

- (i) Monies received by Licensee from Licensee's carriers and directly from residential U.S. subscribers for Licensee's programming service;
- (ii) Licensee's advertising revenues (as billed), or other monies received from sponsors, if any, less advertising agency commissions not to exceed 15% of those fees incurred to a recognized advertising agency not owned or controlled by Licensee;
- (iii) Monies received for the provision of time on the programming service to any third party;
- (iv) Monies received from the sale of time to providers of paid programming such as infomercials;
- (v) Where merchandise, service, or anything of value is received by Licensee in lieu of cash consideration for the use of Licensee's programming service, the fair market value thereof or Licensee's prevailing published rate, whichever is less;
- (vi) Monies or other consideration received by Licensee from Licensee's carriers, but not including monies received by Licensee's carriers from others and not accounted for by Licensee's carriers to Licensee, for the provision of hardware by anyone and used in connection with the programming service;

(vii) Monies or other consideration received for any references to or inclusion of any product or service on the programming service; and

(viii) Bad debts recovered regarding paragraphs (1)(i) through (vii) of this definition.

(2) Gross revenues shall include such payments as set forth in paragraphs (1)(i) through (viii) of this definition to which Licensee is entitled but which are paid to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee's carriers for the programming service. Licensee shall be allowed a deduction from "gross revenues" as defined in paragraph (1) of this definition for affiliate revenue returned during the reporting period and for bad debts actually written off during reporting period.

Licensee means any preexisting subscription service as defined in 17 U.S.C. 114(j)(11).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C), and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

§ 382.3 Royalty fees for the digital performance of sound recordings and the making of ephemeral recordings by preexisting subscription services.

(a) Commencing January 1, 2013, and continuing through December 31, 2017, the monthly royalty fee to be paid by a Licensee for the public performance of sound recordings pursuant to 17 U.S.C. 114 and the making of any number of Ephemeral Recordings to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be a percentage of monthly Gross Revenues resulting from residential services in the United States as follows: for 2013, 15%; for 2014, 20%; for 2015, 25%; for 2016, 35%; and for 2017, 45%.

(b) Each Licensee making digital performances of sound recordings pursuant to 17 U.S.C. 114 and Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment of \$100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but the royalties due and payable for a given year or any month therein under paragraph (a) of this section shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

(c) The royalty payable under 17 U.S.C. 112(e) for the making of phonorecords used by the Licensee solely to facilitate transmissions for which it pays royalties as and when provided in this subpart shall be included within, and constitute 5% of, such royalty payments.

(d) A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment and the statement of account are received.

§ 382.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under §382.3 to the Collective.

(b) *Timing of payment.* A Licensee shall make any payments due under §382.3 on a monthly basis on or before the 45th day after the end of each month for that month.

(c) *Statements of Account.* Licensees shall submit monthly statements of account on a form provided by the Collective. A statement of account shall contain the following information:

- (1) Such information as is necessary to calculate the accompanying royalty payments;
- (2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;
- (3) The signature of a duly authorized officer or representative of the Licensee;
- (4) The printed or typewritten name of the person signing the statement of account;
- (5) The date of signature;
- (6) The title or official position held in relation to the Licensee by the person signing the statement of account;
- (7) A certification of the capacity of the person signing; and
- (8) A statement to the following effect:

I, the undersigned officer or representative of the Licensee, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(d) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in §370.3 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (c)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with §382.8.

(e) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 382.5 Confidential information.

(a) *Definition.* For purposes of this subpart, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to §382.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §382.16;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 382.6 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of five (5) percent or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 382.7 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner and Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of five (5) percent or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 382.8 Unclaimed funds.

If the Collective is unable to identify or locate a copyright owner or performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Subpart B—Preexisting Satellite Digital Audio Radio Services

Authority: 17 U.S.C. 112(e), 114, 804(b)(3).

§ 382.10 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period from January 1, 2013, through December 31, 2017.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§ 382.11 Definitions.

For purposes of this subpart, the following definitions shall apply:

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2013–2017 license period, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114 and subject to the limitations specified in 17 U.S.C. 112(e).

GAAP shall mean generally accepted accounting principles in effect from time to time in the United States.

Gross Revenues. (1) Gross Revenues shall mean revenues recognized by the Licensee in accordance with GAAP from the operation of an SDARS in the U.S., and shall be comprised of the following:

(i) All subscription, activation, subscription-related and other revenues recognized by Licensee from fees paid or payable by or for U.S. subscribers to Licensee's SDARS with respect to any and all services provided by the Licensee to such subscribers, unless excluded by paragraph (3) below;

(ii) Licensee's advertising revenues, or other revenues from sponsors, if any, attributable to advertising on channels of Licensee's SDARS in the U.S. other than those that use only incidental performances of sound recordings, less advertising agency and sales commissions attributable to advertising revenues included in Gross Revenues; and

(iii) Revenues attributable to the sale, lease or other distribution of equipment and/or other technology for use by U.S. subscribers to receive or play the SDARS service, including any shipping and handling fees therefor.

(2) Gross Revenues shall include such payments as set forth in paragraphs (1)(i) through (iii) of the definition of "Gross Revenues" to which Licensee is entitled but which are paid to a parent, subsidiary or division of Licensee.

(3) To the extent otherwise included by paragraph (1), Gross Revenues shall exclude:

(i) Royalties paid to Licensee by persons other than subscribers, advertisers and sponsors for intellectual property rights;

(ii) Revenues from the sale of phonorecords and digital phonorecord deliveries sold by Licensee (but not any affiliate fees or other payments by a third party for advertising of downloads sold by a third party);

(iii) Sales and use taxes; and

(iv) Revenues recognized by Licensee for the provision of –

(A) Data services (*e.g.*, weather, traffic, destination information, messaging, sports scores, stock ticker information, extended program associated data, video and photographic images, and such other telematics and/or data services as may exist from time to time, but not transmission of sound recording data), when such services are provided on a standalone basis (*i.e.*, priced separately from Licensee's SDARS, and offered at the same price both to subscribers to Licensee's SDARS and persons who are not subscribers to Licensee's SDARS);

(B) Channels, programming, products and/or other services provided outside of the United States; and

(C) Subscription revenues recognized for separately licensed services, including webcasting, interactive services, transmissions to business establishments, and audio services bundled with television programming and subject to the rates provided in part 383, when such services are provided on a standalone basis (*i.e.*, priced separately from Licensee's SDARS, and offered at the same price both to subscribers to Licensee's SDARS and persons who are not subscribers to Licensee's SDARS).

Licensee is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make transmissions over a preexisting satellite digital audio radio

service, and has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions.

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C), and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

SDARS means the preexisting satellite digital audio radio services as defined in 17 U.S.C. 114(j)(10).

§ 382.12 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.

(a) *In general.* The monthly royalty fee to be paid by a Licensee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be the percentage of monthly Gross Revenues as follows: for 2013, 12%; for 2014, 14%; for 2015, 16%; for 2016, 18%; and for 2017, 20%.

(b) *Ephemeral recordings.* The royalty payable under 17 U.S.C. 112(e) for the making of phonorecords used by the Licensee solely to facilitate transmissions for which it pays royalties as and when provided in this subpart shall be included within, and constitute 5% of, such royalty payments.

(c) *Ephemeral recordings minimum fee.* Each Licensee making Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment of \$100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but the Ephemeral Recordings royalties due and payable for a given year or any month therein under subsections (a) and (b) shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

§ 382.13 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under §382.12 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under §382.12 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114.

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced

by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114 that have themselves authorized the Collective.

(ii) The Copyright Royalty Judges shall publish in the Federal Register within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments.* A Licensee shall make any payments due under §382.12 on a monthly basis on or before the 45th day after the end of each month for that month. All payments shall be rounded to the nearest cent.

(d) *Late payments and statements of account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment and the statement of account are received by the Collective.

(e) *Statements of account.* Any payment due under §382.12 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

- (1) Such information as is necessary to calculate the accompanying royalty payments;
- (2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;
- (3) The signature of a duly authorized officer or representative of the Licensee;
- (4) The printed or typewritten name of the person signing the statement of account;
- (5) The date of signature;
- (6) The title or official position held in relation to the Licensee by the person signing the statement of account;
- (7) A certification of the capacity of the person signing; and
- (8) A statement to the following effect:

I, the undersigned officer or representative of the Licensee, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(f) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in §370.4 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (f)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with §382.17.

(g) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 382.14 Confidential information.

(a) *Definition.* For purposes of this subpart, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to §382.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §382.16;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 382.15 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards

by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 382.16 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner and Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 382.17 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Exhibit B
Redlined Proposed Regulations

PART 382—RATES AND TERMS FOR DIGITAL TRANSMISSIONS OF SOUND RECORDINGS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY PREEXISTING SUBSCRIPTION SERVICES AND PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES

Subpart A—Preexisting Subscription Services

Sec.

382.1 General.

382.2 Definitions.

382.3 Royalty fees for the digital performance of sound recordings and the making of ephemeral ~~phonorecords~~recordings by preexisting subscription services.

~~382.3~~382.4 Terms for making payment of royalty fees;~~382.4—Confidential information and statements of account.~~

382.5 ~~Verification of statements of account.~~Confidential information.

382.6 Verification of royalty payments.

382.7 ~~Unknown copyright owners.~~Verification of royalty distributions.

382.8 Unclaimed funds.

Subpart B—Preexisting Satellite Digital Audio Radio Services

382.10 General.

382.11 Definitions.

382.12 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.

382.13 Terms for making payment of royalty fees and statements of account.

382.14 Confidential information.

382.15 Verification of royalty payments.

382.16 Verification of royalty distributions.

382.17 Unclaimed funds.

Authority: 17 U.S.C. 112(e), 114 and 801(b)(1).

Subpart A—Preexisting Subscription Services

§ 382.1 General.

(a) This subpart establishes rates and terms of royalty payments for the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. ~~114(d)(2), 114,~~ and the making of ~~ephemeral phonorecords~~Ephemeral Recordings in connection with the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 112(e).

(b) Upon compliance with 17 U.S.C. 114 and the terms and rates of this subpart, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 114(d)(2).

(c) Upon compliance with 17 U.S.C. 112(e) and the terms and rates of this subpart, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 112(e) without limit to the number of ephemeral phonorecords made.

(d) For the purposes of this subpart, *Licensee* means any preexisting subscription service as defined in 17 U.S.C. 114(j)(11).

§ 382.2 Definitions.

For purposes of this subpart, the following definitions shall apply:

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2013–2017 license period, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114 and subject to the limitations specified in 17 U.S.C. 112(e).

Gross revenues shall mean all monies derived from the operation of the programming service of the Licensee and shall be comprised of the following:

(i) Monies received by Licensee from Licensee's carriers and directly from residential U.S. subscribers for Licensee's programming service;

(ii) Licensee's advertising revenues (as billed), or other monies received from sponsors, if any, less advertising agency commissions not to exceed 15% of those fees incurred to a recognized advertising agency not owned or controlled by Licensee;

(iii) Monies received for the provision of time on the programming service to any third party;

(iv) Monies received from the sale of time to providers of paid programming such as infomercials;

(v) Where merchandise, service, or anything of value is received by Licensee in lieu of cash consideration for the use of Licensee's programming service, the fair market value thereof or Licensee's prevailing published rate, whichever is less;

(vi) Monies or other consideration received by Licensee from Licensee's carriers, but not including monies received by Licensee's carriers from others and not accounted for by

Licensee's carriers to Licensee, for the provision of hardware by anyone and used in connection with the programming service;

(vii) Monies or other consideration received for any references to or inclusion of any product or service on the programming service; and

(viii) Bad debts recovered regarding paragraphs (1)(i) through (vii) of this definition.

(2) Gross revenues shall include such payments as set forth in paragraphs (1)(i) through (viii) of this definition to which Licensee is entitled but which are paid to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee's carriers for the programming service. Licensee shall be allowed a deduction from "gross revenues" as defined in paragraph (1) of this definition for affiliate revenue returned during the reporting period and for bad debts actually written off during reporting period.

Licensee means any preexisting subscription service as defined in 17 U.S.C. 114(j)(11).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C), and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

§ 382.2382.3 Royalty fees for the digital performance of sound recordings and the making of ephemeral phonorecord recordings by preexisting subscription services.

(a) Commencing January 1, 2008, 2013, and continuing through December 31, 2011, ~~a Licensee's 2017~~, the monthly royalty fee to be paid by a Licensee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral ~~phonorecords~~ Ephemeral Recordings to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be 7.25% a percentage of such Licensee's monthly gross revenues ~~Gross Revenues~~ resulting from residential services in the United States as follows: for 2013, 15%; for 2014, 20%; for 2015, 25%; for 2016, 35%; and for 2017, 45%.

(b) Commencing January 1, 2012, and continuing through December 31, 2012, ~~a Licensee's monthly royalty fee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be 7.5% of such Licensee's monthly gross revenues resulting from residential services in the United States.~~ (c) Each Licensee making digital performances of sound recordings pursuant to 17 U.S.C. 114(d)(2) and ~~ephemeral phonorecords~~ Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment of \$100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but the royalties due and payable for a given year or any month therein under ~~paragraphs~~ paragraph (a) and (b) of this section shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

(c) The royalty payable under 17 U.S.C. 112(e) for the making of phonorecords used by the Licensee solely to facilitate transmissions for which it pays royalties as and when provided in this subpart shall be included within, and constitute 5% of, such royalty payments.

(d) A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment ~~is~~ and the statement of account are received.

~~(e)(1) For purposes of this section, gross revenues shall mean all monies derived from the operation of the programming service of the Licensee and shall be comprised of the following:~~

~~(i) Monies received by Licensee from Licensee's carriers and directly from residential U.S. subscribers for Licensee's programming service;~~

~~(ii) Licensee's advertising revenues (as billed), or other monies received from sponsors, if any, less advertising agency commissions not to exceed 15% of those fees incurred to a recognized advertising agency not owned or controlled by Licensee;~~

~~(iii) Monies received for the provision of time on the programming service to any third party;~~

~~(iv) Monies received from the sale of time to providers of paid programming such as infomercials;~~

~~(v) Where merchandise, service, or anything of value is received by Licensee in lieu of cash consideration for the use of Licensee's programming service, the fair market value thereof or Licensee's prevailing published rate, whichever is less;~~

~~(vi) Monies or other consideration received by Licensee from Licensee's carriers, but not including monies received by Licensee's carriers from others and not accounted for by Licensee's carriers to Licensee, for the provision of hardware by anyone and used in connection with the programming service;~~

~~(vii) Monies or other consideration received for any references to or inclusion of any product or service on the programming service; and~~

~~(viii) Bad debts recovered regarding paragraphs (e)(1)(i) through (vii) of this section.~~

(2) Gross revenues shall include such payments as set forth in paragraphs (e)(1)(i) through (viii) of this section to which Licensee is entitled but which are paid to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee's carriers for the programming service. Licensee shall be allowed a deduction from "gross revenues" as defined in paragraph (e)(1) of this section for affiliate revenue returned during the reporting period and for bad debts actually written off during reporting period.

(f) During any given payment period, the value of each performance of each digital sound recording shall be the same.

§ 382.3382.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* ~~All~~ A Licensee shall make the royalty payments shall be made due under §382.3 to the Collective designated for the collection and distribution of royalties for the 2008-2012 time period, which shall be SoundExchange.

(b) *Timing of payment.* ~~Payment shall be made on the forty-fifth~~ A Licensee shall make any payments due under §382.3 on a monthly basis on or before the 45th day after the end of each month for that month, commencing with the month succeeding the month in which the royalty fees are set.

(c) *Statements of Account.* Licensees shall submit monthly statements of account on a form provided by the Collective. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payments;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The signature of a duly authorized officer or representative of the Licensee;

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) The title or official position held in relation to the Licensee by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned officer or representative of the Licensee, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(ed) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to ~~copyright owners and performers~~ Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those ~~copyright owners, performers~~ Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all

performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in §370.3 of this chapter.

(2) If the Collective is unable to locate a ~~copyright owner~~Copyright Owner or ~~performer~~Performer entitled to a distribution of royalties under paragraph (c)(1) of this section within 3 years from the date of payment by a Licensee, such ~~distribution may first be applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common-law or statutes of any State.~~royalties shall be handled in accordance with §382.8.

(e) Retention of records. Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 382.4382.5 Confidential information and statements of account.

(a) Definition. For purposes of this subpart, confidential information "Confidential Information" shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the nonexempt preexisting subscription service filing the statement. Confidential information shall also include any information so designated in a confidentiality agreement which has been duly executed between a nonexempt preexisting subscription service and an interested party, or between one or more interested parties; Provided that all such information shall be made available, for the verification proceedings provided for in §§382.5 and 382.6. Licensee submitting the statement.

(b) ~~Nonexempt preexisting subscription services shall submit monthly statements of account on a form provided by the Collective and the monthly royalty payments.~~

(c) ~~A statement of account shall include only such information as is necessary to verify the accompanying royalty payment. Additional information beyond that which is sufficient to verify the calculation of the royalty fees shall not be included on the statement of account.~~Exclusion. Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) Use of Confidential Information. In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) ~~Access to the confidential information pertaining to the royalty payments~~Disclosure of Confidential Information. Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities ~~directly related hereto, who are not~~

~~also employees or officers of a sound recording copyright owner or performing artist, and where related thereto, for the purpose of performing such duties during the ordinary course of employment, their work and who require access to the records; and Confidential Information;~~

(2) ~~An independent and qualified auditor who is not an employee or officer of a sound recording copyright owner or performing artist, but~~ Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the interested copyright owners Collective with respect to the verification of the royalty payments, verification of a Licensee's statement of account pursuant to §382.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §382.16;

(3) ~~Copyright owners and performers~~ Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Licensee whose Confidential Information is being supplied, or agents thereof, subject to an appropriate confidentiality agreement, provided that the sole confidential information that may be shared pursuant to this paragraph (d)(3) are the monthly statements of account that accompany royalty payments and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) Safeguarding of Confidential Information. ~~The Collective or~~ and any person identified in paragraph (d) of this section shall implement procedures to safeguard all confidential financial and business information, including, but not limited to royalty payments, submitted as part of the statements of account, against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect confidential financial and business information Confidential Information or similarly sensitive information belonging to the Collective or such person.

(f) ~~Books and records relating to the payment of the license fees shall be kept in accordance with generally accepted accounting principles for a period of three years. These records shall include, but are not limited to, the statements of account, records documenting an interested party's share of the royalty fees, and the records pertaining to the administration of the collection process and the further distribution of the royalty fees to those interested parties entitled to receive such fees.~~

~~§ 382.5~~ 382.6 **Verification of statements of account** royalty payments.

(a) *General.* This section prescribes general rules pertaining to the verification of the statements of account by interested parties according to terms promulgated by the Copyright Royalty Board procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* ~~Interested parties~~The Collective may conduct a single audit of a ~~nonexempt preexisting subscription service~~Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* ~~Interested parties must submit~~The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular ~~service with the Copyright Royalty Board~~Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing the receipt of the notice of intent to audit ~~within 30 days of the filing of the interested parties' notice. Such~~such filing. The notification of intent to audit shall also be served at the same time on the party ~~to be audited.~~Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Retention of records.* ~~The party requesting the verification procedure~~Acquisition and retention of report. The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of three not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent ~~auditor~~and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit: Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* ~~The interested parties requesting the verification procedure~~Collective shall pay for the cost of the verification procedure, unless an independent auditor concludes it is finally determined that there was an underpayment of five (5) percent or more, in which case, the service which made the the Licensee shall, in addition to paying the amount of any underpayment ~~shall~~, bear the reasonable costs of the verification procedure.

(g) *Interested parties.* ~~For purposes of this section, interested parties are those copyright owners who are entitled to receive royalty fees pursuant to 17 U.S.C. 114(g), their designated agents, or the Collective.~~

§ 382.6382.7 Verification of royalty paymentsdistributions.

(a) *General.* This section prescribes ~~general rules pertaining to the verification of the payment of royalty fees to those parties entitled to receive such fees, according to terms promulgated by the Copyright Royalty Board~~procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* ~~Interested parties~~A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* ~~Interested parties must submit~~A Copyright Owner and Performer must file with the Copyright Royalty Judges a notice of intent to audit the entity making the royalty payment with the Copyright Royalty BoardCollective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing the receipt of the notice of intent to audit within 30 days of the filing of the interested parties' notice. Suchsuch filing. The notification of interestintent to audit shall also be served at the same time on the party to be auditedCollective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Retention of records.* ~~The interested party~~Acquisition and retention of report. The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of threenot less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent auditor~~and Qualified Auditor~~, shall serve as an acceptable verification procedure for all ~~interested parties~~ with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* ~~The interested parties~~Copyright Owner or Performer requesting the verification procedure shall pay for the cost of the verification procedure, unless an independent auditor concludesit is finally determined that there was an underpayment of five

(5) percent or more, in which case, ~~the entity which made the~~ the Collective shall, in addition to paying the amount of any underpayment shall, bear the reasonable costs of the verification procedure.

~~(g) Interested parties.~~ For purposes of this section, interested parties are those who are entitled to receive royalty payments pursuant to 17 U.S.C. 114(g)(2), or their designated agents.

~~§ 382.7 Unknown copyright owners:~~ § 382.8 Unclaimed funds.

If the Collective is unable to identify or locate a copyright owner or performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Subpart B—Preexisting Satellite Digital Audio Radio Services

Authority: 17 U.S.C. 112(e), ~~114(f)~~, 114, 804(b)(3).

§ 382.10 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period from January 1, ~~2007~~2013, through December 31, ~~2012~~2017.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§ 382.11 Definitions.

For purposes of this subpart, the following definitions shall apply:

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the ~~2007–2012~~2013–2017 license period, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and ~~114(f)~~114.

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f) and subject to the limitations specified in 17 U.S.C. 112(e).

GAAP shall mean generally accepted accounting principles in effect from time to time in the United States.

Gross Revenues. (1) Gross Revenues shall mean ~~revenue~~revenues recognized by the Licensee in accordance with GAAP from the operation of an SDARS in the U.S., and shall be comprised of the following:

(i) ~~Subscription revenue~~All subscription, activation, subscription-related and other revenues recognized by Licensee ~~directly from residential~~from fees paid or payable by or for U.S.

~~subscribers for~~ Licensee's SDARS with respect to any and all services provided by the Licensee to such subscribers, unless excluded by paragraph (3) below; and

(ii) ~~Licensee's advertising revenues, or other monies received~~ revenues from sponsors, if any, attributable to advertising on channels of Licensee's SDARS in the U.S. other than those that use only incidental performances of sound recordings, less advertising agency and sales commissions; attributable to advertising revenues included in Gross Revenues; and

(iii) Revenues attributable to the sale, lease or other distribution of equipment and/or other technology for use by U.S. subscribers to receive or play the SDARS service, including any shipping and handling fees therefor.

(2) ~~Gross Revenues shall include such payments as set forth in paragraphs (1)(i) and through (iii) of the definition of "Gross Revenues" to which Licensee is entitled but which are paid to a parent, wholly owned subsidiary or division of Licensee.~~

(3) To the extent otherwise included by paragraph (1), Gross Revenues shall exclude:

~~(i) Monies or other consideration attributable to the sale and/or license of equipment and/or other technology, including but not limited to bandwidth, sales of devices that receive the Licensee's SDARS and any taxes, shipping and handling fees therefor;~~ (ii) Royalties paid to Licensee by persons other than subscribers, advertisers and sponsors for intellectual property rights;

~~(iii) Monies or other consideration received by Licensee~~ (ii) Revenues from the sale of phonorecords and digital phonorecord deliveries sold by Licensee (but not any affiliate fees or other payments by a third party for advertising of downloads sold by a third party);

~~(iv) Sales and use taxes, shipping and handling, credit card, invoice, and fulfillment service fees;~~ (v) Bad debt expense, and

~~(vi)~~ Revenues recognized by Licensee for the provision of—

~~(A) Current and future data~~ Data services offered for a separate charge (e.g., weather, traffic, destination information, messaging, sports scores, stock ticker information, extended program associated data, video and photographic images, and such other telematics and/or data services as may exist from time to time, but not transmission of sound recording data), when such services are provided on a standalone basis (i.e., priced separately from Licensee's SDARS, and offered at the same price both to subscribers to Licensee's SDARS and persons who are not subscribers to Licensee's SDARS);

~~(B) Channels, programming, products and/or other services offered for a separate charge where such channels use only incidental performances of sound recordings;~~ (C) Channels, programming, products and/or other services provided outside of the United States; and

~~(D) Channels, programming, products and/or other services for which the performance of sound recordings and/or the making of ephemeral recordings is exempt from any license requirement or~~

isC) Subscription revenues recognized for separately licensed services, including by a statutory license and, for the avoidance of doubt, webcasting, audio services bundled with television programming, webcasting, interactive services, and transmissions to business establishments, and audio services bundled with television programming and subject to the rates provided in part 383, when such services are provided on a standalone basis (i.e., priced separately from Licensee's SDARS, and offered at the same price both to subscribers to Licensee's SDARS and persons who are not subscribers to Licensee's SDARS).

Licensee is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make transmissions over a preexisting satellite digital audio radio service, and has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions.

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C), and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

Residential means, with respect to a service, a service that may be licensed under the provisions of 17 U.S.C. 114(d)(2)(B); and, with respect to subscribers, subscribers to such a service.

SDARS means the preexisting satellite digital audio radio services as defined in 17 U.S.C. 114(j)(10).

Term means the period commencing January 1, 2007, and continuing through December 31, 2012.

§ 382.12 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.

(a) *In general.* The monthly royalty fee to be paid by a Licensee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be the percentage of monthly Gross Revenues ~~resulting from Residential services in the United States~~ as follows: for 2007 and 2008, 6.0%; for 2009, 6.5%; for 2010, 7.0%; for 2011, 7.5%; and for 2012, 8.0% as follows: for 2013, 12%; for 2014, 14%; for 2015, 16%; for 2016, 18%; and for 2017, 20%.

(b) *Ephemeral recordings.* The royalty payable under 17 U.S.C. 112(e) for the making of phonorecords used by the Licensee solely to facilitate transmissions ~~during the Term~~ for which it pays royalties as and when provided in this subpart shall be included within, and constitute 5% of, such royalty payments.

(c) *Ephemeral recordings minimum fee.* Each Licensee making Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment of \$100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but the

Ephemeral Recordings royalties due and payable for a given year or any month therein under subsections (a) and (b) shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

§ 382.13 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under §382.12 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under §382.12 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114.

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114 that have themselves authorized the Collective.

(ii) The Copyright Royalty Judges shall publish in the Federal Register within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments.* A Licensee shall make any payments due under §382.12 on a monthly basis on or before the 45th day after the end of each month for that month, ~~except that payments due under §382.12 for the period beginning January 1, 2007, through the last day of the month in which the Copyright Royalty Judges issue their final determination adopting these rates and terms shall be due 45 days after the end of such period.~~ All payments shall be rounded to the nearest cent.

(d) *Late payments and statements of account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment ~~is~~ and the statement of account are received by the Collective.

(e) *Statements of account.* Any payment due under §382.12 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

- (1) Such information as is necessary to calculate the accompanying royalty payments;
- (2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;
- (3) The ~~handwritten~~ signature of a duly authorized officer or representative of the Licensee;
- (4) The printed or typewritten name of the person signing the statement of account;
- (5) The date of signature;
- (6) The title or official position held in relation to the Licensee by the person signing the statement of account;
- (7) A certification of the capacity of the person signing; and
- (8) A statement to the following effect:

I, the undersigned officer or representative of the Licensee, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(f) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in §370.4 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (f)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with §382.17.

(g) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 382.14 Confidential information.

(a) *Definition.* For purposes of this subpart, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to §382.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §382.16;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 382.15 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 382.16 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner and Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 382.17 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Index of Witness Statements

Tab	Witness	Title
1	Janusz Ordovery	Professor of Economics and former Director of the Masters in Economics Program at New York University
2	Thomas Z. Lys	Eric L. Kohler Chair in Accounting and Professor of Accounting and Information Management, Kellogg School of Management, Northwestern University
3	J. Gregory Sidak	Chairman, Criterion Economics, L.L.C. and Ronald Coase Professor of Law and Economics, Tilburg Institute for Law and Economics, Tilburg University
4	George S. Ford	President, Applied Economic Studies
5	Jonathan Bender	Chief Operating Officer, SoundExchange, Inc.
6	Stephen Bryan	Executive Vice President of Digital Strategy and Business Development, Recorded Music, Warner Music Group
7	Charles Ciongoli	Executive Vice President and Chief Financial Officer, Universal Music Group North America
8	Raymond M. Hair	International President of the American Federation of Musicians of the United States and Canada
9	Darius Van Arman	Founder, Jagjaguwar

D


SoundExchange Exhibit Index

Exhibit No.	Sponsored By	Description
SX Ex. 101-DP	Darius Van Arman	Email attaching Sirius XM Radio Inc.'s proposed sound recording catalog licenses for Dead Oceans, Jagjaguwar, and Secretly Canadian Records (Sept. 2011)

CERTIFICATE OF SERVICE

I, Garrett A. Levin, do hereby certify that copies of the foregoing **WRITTEN DIRECT STATEMENT OF SOUNDEXCHANGE, INC.** (Restricted version) were sent via electronic mail (without exhibits) and overnight mail (with exhibits) on the 29th day of November, 2011, to the following:

<p>R. Bruce Rich Bruce S. Meyer Todd D. Larson WEIL, GOTSHAL & MANGES LLP 767 Fifth Avenue New York, New York 10153 Fax: (212) 310-8007 r.bruce.rich@weil.com bruce.meyer@weil.com todd.larson@weil.com</p> <p><i>Counsel for Sirius XM Radio Inc.</i></p>	<p>Paul M. Fakler Eric Roman ARENT FOX LLP 1675 Broadway New York, New York 10019-5874 Fax: (212) 484-3990 fakler.paul@arentfox.com roman.eric@arentfox.com</p> <p><i>Attorneys for Music Choice</i></p>
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Garrett A. Levin